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Betty D. Montgomery**

October 4, 2002

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United States Department of Commerce  
National Oceanic and Atmospheric Administration  
1305 East-West Highway  
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RE: *In the Consistency Appeal of Barnes Nursery, Inc. from an  
Objection by the State of Ohio, Department of Natural Resources*  
United States Department of Commerce, Office of the Secretary

Dear Mr. Gleaves:

Enclosed please find a copy of the **Initial Brief of the State of Ohio, Department of Natural Resources** in the above referenced consistency appeal, which was delivered to the Secretary of the United States Department of Commerce.

Should you have any questions, please do not hesitate to contact us.

Sincerely,

BETTY D. MONTGOMERY  
ATTORNEY GENERAL

A handwritten signature in cursive script, appearing to read "C. Frazzini", is written over the typed name.

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**BEFORE THE UNITED STATES DEPARTMENT OF COMMERCE  
OFFICE OF THE SECRETARY**

IN THE MATTER OF:  
THE CZMA CONSISTENCY  
APPEAL OF BARNES NURSERY, INC.

THE HONORABLE  
DONALD EVANS  
SECRETARY OF COMMERCE

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APPEAL FROM THE CONSISTENCY OBJECTION OF  
THE STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES

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INITIAL BRIEF OF THE STATE OF OHIO,  
DEPARTMENT OF NATURAL RESOURCES

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## **I. STATEMENT OF THE FACTS**

### **A. THE SITE OF THE PROPOSED ACTIVITY IS A CATEGORY 3 WETLAND COMPLEX IMMEDIATELY ADJACENT TO A DEDICATED STATE NATURE PRESERVE DESIGNATED AS CRITICAL HABITAT FOR FEDERALLY ENDANGERED SPECIES.**

The project site for the proposed activity at issue is located within Ohio's coastal zone as identified in the State's federally approved Coastal Management Program ("Ohio's CMP" or "OCMP"), and within "one of the few natural barrier beach/lagoon wetland complexes remaining in the State of Ohio on Lake Erie's south shore and immediately adjacent to Sheldon[s] Marsh State Nature Preserve." (Ohio EPA Letter, July 21, 2000, Exhibit A)

"Sheldon's Marsh State Nature Preserve is a 463-acre preserve containing some of the last remaining undeveloped stretches of lakeshore in the Sandusky Bay region. Preserved are habitat relicts of the original lake-marsh-forest ecosystem such as old field, hardwood forest, woodland swamp, cattail marsh, barrier sand beach and open water. Nearly 300 bird species and many wildflowers, including the spectacular cardinal flower, are known to the area. Sheldon Marsh is well known for its valuable habitat for fledgling American bald eagles, migratory waterfowl, shore birds and wood warblers."

Ohio Coastal Management Program Document, Vol. I, Part II, Chapter 6, Pg. 11 The preserve, and the wetlands complex of which it is a part, "represents one of the last and probably best example in Ohio of a naturally functioning Lake Erie wetland and barrier beach system." (State's Objection, Exhibit B)

Wetlands are considered "a critical natural resource in Ohio." Ohio Coastal Management Program Document, Vol. I, Part II, Chapter 5, Pg. 45 "This wetland complex is a Category 3 wetland under Ohio's Wetland Water Quality Standards." (Ohio EPA Letter, July 21, 2000, Exhibit A; see also USFWS Letter, August 21, 2000, Exhibit C and USEPA Letter, October 12, 2000, Exhibit D, concurring in Category 3 Wetland Determination of Ohio EPA) "Besides being a rare habitat type in Ohio, the area harbors endangered species and is a significant waterfowl and neotropical songbird stopover and breeding location." (Ohio EPA Letter, July 21, 2000,

Exhibit A) In fact, the habitat in this area has been designated "critical habitat for the Federally endangered piping plover (*Charadrius melodus*).\" (USFWS Letter, August 21, 2000, Exhibit C; USFWS Letter, June 11, 2001, Exhibit E)

**B. A NATIONWIDE PERMIT NO. 27 WAS ISSUED BY THE CORPS FOR ACTIVITIES IN THIS WETLAND SITE IN ERROR**

On June 19, 2000, the U.S. Army Corps of Engineers ("the Corps") received Application No. 2000-02170(0) for a Nationwide Permit No. 27 to authorize construction of a 3,000 foot channel and earthen berm, to be constructed by dredging and side casting the dredged material parallel to the channel through the Category 3 wetland complex described above and immediately adjacent to Sheldon's Marsh State Nature Preserve. The channel was to be 20 feet wide and 10 feet deep, while the berm was to be 44 feet wide and 4 feet in height. The project purpose stated in the Nationwide Permit Application was to create deep water habitat and nesting islands for waterfowl. (Nationwide Permit Application, Exhibit F, Items 12, 18, 19, 20) It was also noted on the Nationwide Permit Application that, "It is anticipated that several dredge side casting operations will be required over a four year period." (Nationwide Permit Application, Exhibit F, Item 20)

The Nationwide Permit Application listed the applicant's name as "C.C.C.M.B." and the authorized agent's name and title as Robert W. Barnes, President. (Nationwide Permit Application, Exhibit F, Items 5 and 8) The identification of C.C.C.M.B. is presented in Appellant's Initial Brief on page 2, footnote 2. Documentation in the records of the Corps and the State provides signed authorizations for the Nationwide Permit Application from Judith A. Corso, Trustee and General Partner, CCCMB, Chuck Corso, Sr., General Partner, CCCMB and J.S.M Development Ltd., by John Murray, General Partner. However, Cedar Fair, L.P. identified by Barnes Nursery as one of the three "Cs" in CCCMB, sent contradictory statements

to Barnes Nursery regarding any authorization to conduct the proposed activity across its property. On April 20, 2000, Cedar Fair, L.P. gave certain authorizations to the President of CCCMB for construction of the project, then, on August 23, 2000, Cedar Fair, L.P. informed the CCCMB President that he had no authorization to dredge on its property and requested that its name be removed from the Nationwide Permit Application. (Cedar Fair, L.P. Letter, April 20, 2000, Exhibit G; Cedar Fair, L.P. Letter August 23, 2000, Exhibit H)

According to the original plans submitted with the Nationwide Permit Application, the project would have also crossed a portion of Sheldon's Marsh State Nature Preserve located between the westernmost Corso property and Cedar Point. However, there is no record of the applicant requesting any permission from the State of Ohio to cross its property at any time prior to the submission of its Nationwide Permit Application or at any other time. Indeed, the State is not permitted under Ohio law to grant permission for such an activity within its dedicated State nature preserves. (Ohio Revised Code Chapter 1517)

One day after receiving the Application, the Corps issued a Nationwide Permit No. 27 on June 20, 2000. (Nationwide Permit, Exhibit I) In early July 2000, work commenced at the site. (ODNR Aerial Photographs of the project in construction, July 2000, Exhibit J; ODNR 2000 approximation of project location and Erie County 2001 Imagery showing the site, Exhibit K)

**C. BARNES NURSERY FAILED TO COMPLY WITH THE TERMS OF THE ERRONEOUSLY ISSUED NATIONWIDE PERMIT. FEDERAL AND STATE AGENCIES NOTIFIED THE CORPS THAT THE WORK SHOULD BE STOPPED AND THE ERRONEOUSLY ISSUED PERMIT REVOKED. BY THE TIME WORK WAS STOPPED, A CHANNEL 1,500 FEET LONG AND 50 FEET WIDE WITH A PARALLEL EARTHEN BERM 55 FEET WIDE AND 6 FEET IN HEIGHT HAD BEEN DREDGED AND SIDECASTED THROUGH THE CATEGORY 3 WETLAND SITE.**

The Ohio Department of Natural Resources ("ODNR") is Ohio's federally approved coastal management agency under §§ 306 and 307 of the CZMA and 15 CFR Part 930 of the

Department of Commerce's implementing regulations. Upon receiving reports of the construction discussed above, ODNR, the Ohio Environmental Protection Agency ("Ohio EPA"), the United States Fish and Wildlife Service ("USFWS"), and the United States Environmental Protection Agency ("USEPA") all directed correspondence to the Corps requesting that the Corps revoke the Nationwide Permit and order the applicant to stop work on the project. (ODNR Letter, July 21, 2000, Exhibit L; Ohio EPA Letter, July 21, 2000, Exhibit A; USFWS Letter, August 21, 2000, Exhibit C; USEPA Letter, October 12, 2000, Exhibit D) The Federal and State agencies concurred that the Corps was without authority to authorize the project under a Nationwide 27 Permit as "temporary and permanent impacts to Category 3 wetlands were not certified to be authorizable under a Nationwide Permit" in the State of Ohio. (ODNR Letter, July 21, 2000, Exhibit L; Ohio EPA Letter, July 21, 2000, Exhibit A; USFWS Letter, August 21, 2000, Exhibit C; USEPA Letter, October 12, 2000, Exhibit D)

Further, the agencies stated that, even if the project could have been authorized by the Nationwide Permit, the applicant had constructed its project in violation of that authorization. (Corps Environmental Assessment and Statement of Findings for Department of the Army Permit Application No. 2000-02170(1), November 29, 2001, Exhibit M) The Nationwide Permit had authorized a channel and an earthen berm, 3,000 feet in length by dredging and side casting the dredged material parallel to the channel. The channel was to be 20 feet wide and 10 feet deep, while the berm was to be 44 feet wide and 4 feet in height. At the time work was stopped, 1,500 feet of the intended 3,000 foot channel and berm had been constructed. The channel was 50 feet in width and 5 feet in depth, the berm was 55 feet wide and 6 feet high. (Corps Environmental Assessment and Statement of Findings for Department of the Army Permit Application No. 2000-02170(1), November 29, 2001, Exhibit M)

On January 8, 2001, the Corps notified the applicant that the Nationwide Permit had been issued "in error" and therefore, "effective immediately, the portion of [the] project already constructed is deemed an unpermitted activity, and no authorization exists for the remaining unbuilt portion of your project." The Corps went on to state that the applicant could "apply for after the fact authorization for the unpermitted activity." However, if applicant did not apply for "after the fact authorization" the Corps would require it to "restore the entire project site to preconstruction conditions." (Corps Letter, January 8, 2001, Exhibit N)

**D. BARNES NURSERY SUBMITTED AN INDIVIDUAL PERMIT APPLICATION FOR AFTER THE FACT AUTHORIZATION OF ITS PROJECT TO THE CORPS. UPON COMPLETION OF ITS CONSISTENCY REVIEW, ODNR ISSUED ITS CONSISTENCY OBJECTION AND BARNES NURSERY APPEALED THAT OBJECTION TO THE SECRETARY.**

On March 13, 2001, Application No. 2000-02170(1) for an Individual 404 Permit was submitted to the Corps in which the applicant's name was listed as Barnes Nursery, Inc. and the authorized agent was listed as Robert W. Barnes, President. (Individual Permit Application, Exhibit O, Item 5 and 8) The project name under the Individual Permit Application was "East Sandusky Bay Hydrology Restoration Project." (Individual Permit Application, Exhibit O, Item 18)

The Individual Permit Application requested authorization to dredge and discharge over 14,000 cubic yards and specifically sought: (1) after-the-fact authorization to maintain the channel dredged in July 2000, being approximately 1,500 feet long, 50 feet wide and 5 feet deep; (2) after-the-fact authorization to maintain the earthen berm running parallel with the channel formed by the sidecasted dredge material in the construction of the channel, being approximately 500 feet long and 55 feet wide; and (3) five modifications to the as built project. The first of these five modifications involved the restoration of 200 feet of the wetlands disturbed by the

project. The second, third and fourth modifications regarded the grading and division of the earthen berm into five islands. The fifth modification proposed to dredge a narrow "feeder channel" 500 feet long and 5 feet deep in a diagonal line to the northwest, directly across Sheldon's Marsh State Nature Preserve to the waters of Lake Erie. (Corps Public Notice, Exhibit P ; State's Objection, Exhibit B)

The Corps issued its Public Notice for the proposed activity described in Barnes Nursery's after-the-fact Individual Permit Application on May 11, 2001. (Corps Public Notice, Exhibit P ) The USEPA, USFWS, ODNR and Ohio EPA all responded with comments recommending denial of a Corps Individual Permit for the proposed activity. (Corps Environmental Assessment and Statement of Findings for Department of the Army Permit Application No. 2000-02170(1), November 29, 2001, Exhibit M)

Also in May 2001, ODNR received the necessary information and data regarding Barnes Nursery's proposed activity, including the documentation for both the after-the-fact authorization and the proposed modifications requested in the Individual Permit Application. ODNR circulated this information within its relevant divisions and sought comments from the other appropriate state and federal agencies.

After completing its consistency review of the activity proposed by Barnes Nursery in its Individual Permit Application to the Corps, ODNR issued a Consistency Objection in this matter on June 11, 2001. The State objected on the basis that the proposed activity was not consistent with Ohio's Coastal Management Program. Specifically, the State's Objection was based upon ODNR's finding that the proposed activity was not consistent with the following eight enforceable policies of Ohio's CMP: Policy 2 - Shore Erosion Control; Policy 6 - Water Quality; Policy 12 - Wetlands; Policy 14 - Rare and Endangered Species; Policy 17 - Dredging and

Dredged Material Disposal; Policy 26 - Preservation of Cultural Resources; Policy 27 - Fisheries Management; Policy 29 - Wildlife Management (State's Objection, Exhibit B)

In addition to advising Barnes Nursery and the Corps of the proposed activity's inconsistency with Ohio's federally approved CMP, ODNR also informed Barnes Nursery and the Corps in its Objection that the proposed activity, calling for a "feeder channel" to be constructed to connect the existing dredged channel with Lake Erie, would cross a dedicated State nature preserve. Such an action is prohibited by Ohio law, and therefore, regardless of any federal consistency determination to the contrary, the feeder channel element of the proposed activity would not be possible under Ohio law. (State's Objection, Exhibit B; see Ohio Revised Code Chapter 1517)

In response to Ohio's Consistency Objection, Barnes Nursery, through its President, sent a letter to ODNR, dated June 30, 2001, which repeatedly asserted that its proposed activity was consistent with Ohio's CMP. (Barnes Nursery Letter, June 30, 2001, Exhibit Q) By letter dated July 10, 2001, Barnes Nursery filed its Notice of Appeal of the State's Objection with the Secretary.

Though not raised as an issue in Appellant's Initial Brief, it appears that neither the Corps nor the State possesses any written record documenting receipt of a signed Consistency Certification from Barnes Nursery. The federal regulations promulgated under the Coastal Zone Management Act provide that a State agency's federal consistency review of an activity requiring a federal license or permit commences after the Applicant furnishes the State agency with both a Consistency Certification and necessary data and information regarding the proposed activity. 15 CFR 930.57; 15 CFR 930.58; 15 CFR 930.60; see also *Dismissal of Collier Resources Company Consistency Appeal from an Objection by the State of Florida*, [No Number in Original], U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean

Service, Slip Opinion, [No Date in Original] Whether Barnes Nursery's failure to furnish the Consistency Certification to the Federal and State agencies was inadvertent or otherwise, both the Federal and State agencies, and Appellant, have continued through the federal consistency appeal process as though the Certification had been provided. Moreover, Barnes Nursery has repeatedly asserted its consistency with Ohio's CMP.

After conducting its assessment, the Ohio Historical Society informed the Corps on November 7, 2001, that no historic properties would be affected by Barnes Nursery's proposed activity. ODNR also determined that an erosion control permit would not be necessary for the proposed activity. Therefore, with the exceptions of Policy 2 and Policy 26, Barnes Nursery's project remains inconsistent with Enforceable Policies 6, 12, 14, 17, 27 and 29 of Ohio's CMP. These enforceable policies in summary and in relevant part provide the following

Policy 6 - Water Quality

It is the policy of the State of Ohio to maintain and improve the quality of the state's coastal waters by regulating discharge of dredge or fill material into surface waters including wetlands in accordance with Section 401 of the Clean Water Act (Ohio Revised Code § 6111.03).

Policy 12 - Wetlands

It is the policy of the State of Ohio to protect, preserve and manage wetlands with the overall goal to retain the state's remaining wetlands, and where feasible, restore and create wetlands to increase the state's wetland resource base by regulating activities in wetlands through the enforcement of Ohio water quality standards for any activity that may result in any discharge into wetlands and other waters of the state. (Ohio Revised Code § 6111.03(O) and (P); Ohio Administrative Code § 3745-1-05, § 3745-1-32, § 3745-1-50 to 54).

Policy 14 - Rare and Endangered Species

It is the policy of the State of Ohio to preserve and protect rare, threatened and endangered plant and animal species to prevent their possible extinction by protecting the waters that provide a habitat for rare and endangered species. (Ohio Revised Code § 6111.03(O) and (R); Ohio Administrative Code § 3745-1-05(C)).

Policy 17 - Dredging and Dredged Material Disposal

It is the policy of the State of Ohio to provide for the dredging of waterways and to protect water quality and natural resources associated with these waters in the disposal of dredged material by regulating, through the Ohio Environmental Protection Agency water quality certification, the discharge or disposal of dredged material. (Ohio Revised Code § 6111.03(P); Ohio Administrative Code § 3745-1).

Policy 27 - Fisheries Management

It is the policy of the State of Ohio to assure the continued enjoyment of the benefits received from the fisheries of Lake Erie and to maintain and improve these fisheries by protecting fish habitat through Ohio EPA's Section 401 water quality certification authority species (Ohio Revised Code § 6111.03(O) and (P); Ohio Administrative Code § 3745-1, § 3745-1-32).

Policy 29 - Wildlife Management

It is the policy of the State of Ohio to provide for the management of wildlife in the coastal area to assure the continued enjoyment of benefits received from wildlife by protecting all wildlife including nongame and endangered species. (Ohio Revised Code § 1531.02, § 1531.08, and § 1531.25).

**E. IN SPITE OF COMMENTS FROM ALL OTHER FEDERAL AND STATE AGENCIES RECOMMENDING DENIAL OF BARNES NURSERY'S AFTER THE FACT INDIVIDUAL CORPS PERMIT APPLICATION, AND IN SPITE OF THE STATE OF OHIO'S CZMA CONSISTENCY OBJECTION, THE CORPS ISSUED A PROVISIONAL 404 PERMIT TO BARNES NURSERY. SUBSEQUENTLY, OHIO EPA ISSUED A PROPOSED DENIAL OF BARNES NURSERY'S 401 WATER QUALITY CERTIFICATION.**

On December 7, 2001, the Corps issued a Provisional Permit to Barnes Nursery, describing "the work that will be authorized, and the General and Special Conditions which will be placed on [Barnes Nursery's] final [Individual Permit] if the State of Ohio requirements are satisfied." The "State of Ohio requirements" referenced by the Corps were (1) a Section 401 Water Quality Certification from Ohio EPA and (2) a favorable Consistency determination from ODNR or from the Secretary of Commerce. (Provisional Permit, Exhibit R) The Provisional Permit included 29 special conditions, one of which was a provision for a conservation easement encompassing the site, and provided for a feeder channel to be dredged across Sheldon's Marsh State Nature Preserve. As established above, the dredging of a channel across this dedicated state nature preserve would be in violation of Ohio law.

On April 1, 2002, Ohio EPA issued a "Proposed Denial of [Barnes Nursery's] Section 401 Certification to approve construction of a water storage facility in a Category 3 wetland which has resulted in dredging and filling of 4.97 acres of Category 3 wetland, P.N. # (B)2000-

02170(1)." (Ohio EPA Proposed Denial, Exhibit S) This determination is currently under appeal by Barnes Nursery

As mentioned above, this Appeal arose when Barnes Nursery filed its Notice of Appeal of the State's Objection with the Secretary by letter dated July 10, 2001. The Secretary set forth the initial briefing schedule, the standard of review, the burden of proof and the issues to be briefed by Appellant and the State in his August 6, 2001 letter. After a number of requests for extensions of time were filed by the parties, and granted by the Secretary, Barnes Nursery filed a Request for Stay and Remand pursuant to 15 CFR 930.129(c)(3) and (d), without objection by the State, on May 3, 2002. On August 6, 2002, the Secretary denied Appellant's Request for Stay and Remand and directed that Barnes Nursery file its Initial Brief with the Secretary by September 4, 2002, with the State's Initial Brief being due within 30 days of its receipt of Appellant's Initial Brief. Appellant filed its Initial Brief with the Secretary on September 4, 2002. The State received Appellant's Initial Brief on September 5, 2002.

## **II. ISSUES ON APPEAL**

### **A. WHERE AN APPELLANT FAILS TO BASE ITS CONSISTENCY APPEAL ON GROUNDS THAT THE PROPOSED ACTIVITY IS EITHER CONSISTENT WITH THE OBJECTIVES OR PURPOSES OF THE COASTAL ZONE MANAGEMENT ACT OR NECESSARY IN THE INTEREST OF NATIONAL SECURITY, THE SECRETARY MAY DISMISS APPELLANT'S APPEAL FOR GOOD CAUSE.**

Pursuant to the Coastal Zone Management Act ("CZMA") and its corresponding regulations, a State's Consistency Objection precludes a Federal Agency from issuing a federal license or permit requested by an applicant for a proposed activity in that State's coastal zone until either the State issues a Consistency Concurrence or the Secretary of Commerce ("the Secretary") issues an override of the State's Objection. CZMA § 307(C)(3)(A); 15 CFR 930.64; 15 CFR Part 930, Subpart H. The State of Ohio issued its Consistency Objection on June 11,

2001 Because the State has never issued a Consistency Concurrence with regard to Barnes Nursery's proposed activity, the Corps can not issue the 404 permit to Barnes Nursery unless and until the Secretary issues a decision overriding the State's Consistency Objection.

The federal consistency appeal process before the Secretary "is a de novo determination based on the statutory standards of the CZMA and its implementing regulations." *In the Consistency Appeal of Shickrey Anton from an Objection by the South Carolina Coastal Council*, U.S. Department of Commerce, Office of the Secretary, 1991 NOAA LEXIS 56 (May 21, 1991), at 8-9. Further, the Secretary may only override the State's Objection if the Secretary determines that an appellant has submitted sufficient evidence in its Consistency Appeal to meet either one of the two statutory grounds for override provided in the CZMA. These grounds are that the proposed activity is either: (1) consistent with the objectives or purposes of the CZMA, or (2) necessary in the interest of national security. 16 USCA Section 1456 (C)(3)(A) (CZMA § 307); 15 CFR 930.121-122. "[W]ithout sufficient evidence, the Secretary will decide in favor of the State." *Shickrey Anton Appeal*, *supra* at 11

The federal regulations under the CZMA set forth in greater detail "the procedures by which the Secretary may find that a federal license or permit activity which a State agency has found to be inconsistent with the enforceable policies of [that State's] management program, may be federally approved because the activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security." 15 CFR 930.120. With regard to the first ground, a proposed activity requiring a federal permit may be deemed consistent with the objectives and purposes of the CZMA if it meets all three of the following requirements:

- (1) The activity furthers the national interest, as articulated in § 302 or § 303 of the Act, in a significant or substantial manner;
- (2) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively;

- (3) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the [State's federally approved] management program.

15 CFR 930.121 Under the second ground for Secretarial override of a State Objection, a proposed activity 'is necessary in the interest of national security' if a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward a proposed." 15 CFR 930.122.

Barnes Nursery fails to meet either its burden of proof or burden of persuasion in this Appeal as its Brief presents no evidence toward either of the two statutory grounds available under the CZMA for a Secretarial override of the State's Objection. Indeed, Barnes Nursery's Initial Brief is utterly devoid of any reference to either ground or any mention of the federal requirements necessary to satisfy the same. Instead, Barnes Nursery's singular assertion in its Initial Brief is Appellant's claim that it is consistent with Ohio's Coastal Management Program based solely on the opinion of its "paid consultant." Appellant's Initial Brief, pgs. 6-7. Inexplicably, Appellant bases its entire Appeal, not on the CZMA and the federal regulations under which it is bound in this proceeding, but rather upon its allegation that the State agency was incorrect in its Consistency determination. In so claiming, Barnes Nursery states:

"Dr. Herdendorf's opinion is that ODNR's consistency objections are 'unfounded and that the [p]roject is consistent with [Ohio Coastal Management Plan] policies.' In his affidavit, Dr. Herdendorf dissects ODNR's consistency determination, and uses real science and accurate facts to review the construction and environmental impact of the Project.

In his affidavit, Dr. Herdendorf challenges ODNR's entire approach to reviewing the consistency of the Project ... Dr. Herdendorf thus concludes that '[b]y restoring all disturbed coastal wetlands to their pre-existing condition, [Barnes] is now in compliance with the State's wetland policy' ... Dr. Herdendorf concludes that the Project is consistent with the OCMP ... In summary, Dr. Herdendorf's affidavit contains an articulate, well-reasoned and scientifically based refutation of ODNR's conclusions as to consistency."

Appellant's Initial Brief, pg. 7. Barnes Nursery's failure in this regard is particularly unjustifiable, as both the State's Objection and the Secretary's August 6, 2001 letter setting forth the initial

Briefing Schedule clearly provided the grounds for override which must be proved by Appellant.  
(State's Objection, Exhibit B)

Further, Barnes Nursery's arguments are wholly irrelevant to the proceedings herein. In all prior consistency appeals, the Secretary "has declined to review the substantive validity of the State objection in the appeal process" and therefore will not consider whether the State agency was correct in its determination that the proposed activity was inconsistent with that particular state's coastal management program. *Shickrey Anton Appeal, supra* at 9; see also *In the Consistency Appeal of A. Elwood Chestnut from an Objection by the South Carolina Coastal Council, U.S. Department of Commerce, Office of the Secretary*, 1992 NOAA LEXIS 45 (November 4, 1992), at 13; *In the Consistency Appeal of Yeamans Hall Club from an Objection by the South Carolina Coastal Council, U.S. Department of Commerce, Office of the Secretary*, 1992 NOAA LEXIS 50 (August 1, 1992), at 9.

As discussed above, there are two specific grounds under which the Secretary can override a State Consistency Objection. Neither of those grounds involve a critique by an appellant, an appellant's agent, or even the Secretary of the State's determination under its own federally approved coastal management program. Instead, each ground provides a separate and distinct federal determination, which if met by an appellant, allows the Secretary to give the federal permitting agency permission to issue the requested permit in spite of, not because of, a State's Objection. The Secretary may override a State's Objection, but not overrule it. This distinction is more than syntax. It is fundamental to the Federal Consistency Appeal process, and such errors and omissions as those made by Barnes Nursery in its Initial Brief herein warrant dismissal of its Appeal for just cause pursuant to 15 CFR 930.129(a)(5) which provides:

- (a) The Secretary may dismiss an appeal for good cause. A dismissal is the final agency action. Good cause shall include, but is not limited to:

- (5) Failure of the Appellant to base the appeal on grounds that the proposed activity is either consistent with the objectives and purposes of the Act, or necessary in the interest of national security.

15 CFR 930.129(a)(5).

The claims argued by Barnes Nursery present no federal issues over which the Secretary will exercise jurisdiction under the CZMA. In fact, Barnes Nursery has wholly failed to base its Appeal upon the only federal issues over which the Secretary will exercise jurisdiction – the grounds for federal override of the State's Objection. In so doing, Barnes Nursery has not complied with the express mandates of the CZMA upon which its Appeal must be based in order to properly perfect its Appeal before the Secretary. Therefore, for all of the reasons established above, it is respectfully submitted that the Secretary should dismiss Barnes Nursery's Appeal for good cause pursuant to 15 CFR 930.129(a)(5).

**B. APPELLANT'S PROPOSED ACTIVITY IS NOT CONSISTENT WITH THE OBJECTIVES AND PURPOSES OF THE COASTAL ZONE MANAGEMENT ACT AS ITS PROPOSED ACTIVITY FAILS TO SATISFY ANY ONE OF THE THREE REQUIREMENTS UNDER 15 CFR 930.121.**

"The Appellant bears both the burden of proof and the burden of persuasion in Consistency Appeals." *Shickrey Anton Appeal, supra* at 12. As established above, Barnes Nursery has failed to meet its burden of proof in its Initial Brief before the Secretary. Thus, the burden of going forward has not shifted to the State and Barnes Nursery's Appeal should be dismissed. Nevertheless, the State offers this preliminary briefing on the issues set forth in the briefing schedule from the Department of Commerce and in accordance with federal law.

It is without question that the second ground for Secretarial override of the State's Objection is not present in this Appeal. Appellant's proposed activity is not necessary in the interest of national security. Appellant has never claimed nor provided any information to the federal and state agencies to indicate that a national defense or other national security interest

would be significantly impaired if appellant's proposed activity were not permitted to go forward as proposed. Therefore, in order to meet its burden of proof in the Appeal, Barnes Nursery must present sufficient evidence on the first ground that its proposed activity is consistent with the objectives and purposes of the CZMA. Barnes Nursery falls decidedly short of meeting this burden. Even construing the opinions expressed in Appellant's Initial Brief in a light most favorable to Barnes Nursery, its claims fail to meet any one of the three federal requirements which must all be met before the Secretary may issue a decision overriding the State's Objection.

1. **Appellant's proposed activity does not further the national interest as articulated in §302 or §303 of the Coastal Zone Management Act in a significant or substantial manner.**

In order to qualify for a federal override of a State Objection, an appellant must first prove that its proposed activity substantially furthers one or more of the competing national objectives or purposes contained in §§ 302 or 303 of the CZMA. 15 CFR 930.121(a) Therefore, "while a proposed activity may further a national interest beyond the scope of the national interests recognized in or defined by the objectives or purposes of the Act, such a national interest may not be considered" by the Secretary in a CZMA Consistency Appeal. *Shickrey Anton Appeal, supra* at 20. Additionally, an appellant must establish that its proposed activity furthers that defined national interest in a significant or substantial manner. 15 CFR 930.121(a)

In its Initial Brief, Barnes Nursery does not identify which, if any, national interest expressly stated in the CZMA is furthered by its proposed activity. Nor does Barnes Nursery offer evidence to support that its activity would further an objective or purpose of the Act in a significant or substantial manner. The State will not endeavor to presume what Barnes Nursery may or may not allege in this regard. At this time, the State would only respectfully submit that Barnes Nursery's claim that its proposed activity will restore or improve the condition of the

wetlands at issue has met with no agreement from any Federal or State agency, with the possible exception of the Corps.

To the contrary, USEPA, USFWS, Ohio EPA and ODNR have all found, without exception, that the activity proposed by Barnes Nursery will provide no benefit to the wetlands complex it allegedly seeks to enhance, and instead will result in the destruction of this last stretch of untouched wetlands. (USEPA Letter, June 7, 2001, Exhibit T; USFWS Letter June 11, 2001, Exhibit E; Ohio EPA Proposed Denial, Exhibit S; State's Objection, Exhibit B) Therefore, in accordance with past decisions of the Secretary, Barnes Nursery's proposed activity should be found to "contribute minimally, if at all, to the national interest," see *In the Consistency Appeal of Henry Crosby from an Objection from the State of South Carolina, South Carolina Coastal Council*, U.S. Department of Commerce, Office of the Secretary, 1992 NOAA LEXIS 46 (December 29, 1992), at 20 (finding that the national interests purportedly furthered by Appellant's proposed activity of permanently altering wetlands for "waterfowl management," "protection of wildlife and their habitat" and "enhancement of coastal zone resources," were of minimal contribution to the national interest where the State, USFWS and USEPA had all provided comments indicating that Appellant's project would not enhance the resource.)

2. **The proposed activity's adverse coastal effects, when those effects are considered separately or cumulatively, are not outweighed by any minimal national interest allegedly furthered by Appellant's proposed activity.**

Even if Barnes Nursery's proposed activity did further a national objective articulated in the CZMA, that interest could not begin to outweigh the separate and cumulative adverse impacts that Barnes Nursery's partially completed, unauthorized project has had and will have on the wetlands complex it has bisected and the dedicated State nature preserve it borders.

The second requirement which must be met for override requires that the Secretary "identify the adverse effects of the objected to activity on the natural resources of the coastal

zone and then determine whether those effects are substantial enough to outweigh the activities' contribution to the national interest." *In the Consistency Appeal of Michael P. Galgano from an Objection by the New York Department of State*, U.S. Department of Commerce, Office of the Secretary, 1990 NOAA LEXIS 48 (October 29, 1990), at 11-12. "In evaluating the adverse effects of the project on the natural resources of the coastal zone," the Secretary "must consider the adverse effects of the project by itself and in combination with other past, present or reasonably foreseeable activities affecting the coastal zone." *Michael P. Galgano Appeal, supra* at 1-12.

In reviewing the adverse effects of a proposed activity under the CZMA, the Secretary will consider the amount of wetland loss associated with the project. *Shickrey Anton Appeal, supra* at 14. "The quantity of wetland loss, however, is not the only factor the Department will consider in evaluating adverse effects on the environment. Other factors may include, but are not limited to, the nature of the wetland loss and the effects of the wetland loss on the remaining ecosystem." *Shickrey Anton Appeal, supra* at 14.

The Federal and State agencies have provided numerous reports detailing their joint concerns over the activity proposed by Barnes Nursery. The State can discuss these concerns herein, but is unable to balance the adverse impacts against Appellant's purported national interest as required under federal law, because Barnes Nursery has failed to allege any national interest furthered by its proposed activity in its Initial Brief. In the event that the Secretary does not dismiss Barnes Nursery's Appeal for good cause, the State will make a full presentation in its Final Brief before the Secretary of the adverse impacts inflicted upon this Category 3 wetland by Appellant's partially constructed and proposed activity, and will demonstrate that such impacts are not outweighed by any national interest Barnes Nursery may attempt to assert.

The USFWS "has been involved with this project from the beginning, and continues to have a strong interest in the outcome of this project." (USFWS Letter, June 1, 2001, Exhibit E) In fact, the USFWS has submitted five letters regarding this project to the Corps, and a number of informal email communications, detailing its deep concerns regarding this activity and stating its strong, unwavering recommendation that the proposed activity be denied and the area be restored to its preconstruction condition. (USFWS Letter, August 21, 2000, Exhibit C; USFWS Letter, October 13, 2000, Exhibit U; USFWS Letter, June , 2001, Exhibit E; USFWS Letter, July 30, 2001, Exhibit V; USFWS Letter, September 28, 2001, Exhibit W) These letters provided a vast amount of critical comments regarding the proposed activity such as:

"We echo the concerns of the Ohio Department of Natural Resources and Ohio Environmental Protection Agency regarding wetlands and critical habitat for the Federally endangered piping plover (*Charadrius melodus*) ... We also believe that Sheldon Marsh is a Class 3 wetland ... we ask that the dredged material be returned to its original location with best management practices implemented to minimize degradation of water quality and wildlife habitat. We also recommend that restoration measures be taken to return the dredge site to its former natural condition."

"The Sheldon Marsh area is vitally important to numerous species of shorebirds that include the Federally endangered piping plover, the state endangered common tern (*Sterna hirundo*), egrets, herons and others. The nest island design proposed in the Plan will encourage gulls, geese, and swans that will be destructive predators, consumers and competitors to the piping plover, common tern, other shorebirds and also sensitive plant species within the Sheldon Marsh preserve. The nest island design and deep water design will not in any way enhance the Sheldon Marsh area or immediate project area for shorebirds. The Plan will also result in hydrological alterations detrimental to Sheldon Marsh in terms of nutrient depletion, interference with water runoff feeding the marsh and negative effects upon plant community composition."

"This project is located within Sheldon Marsh, one of Lake Erie's last remaining intact coastal wetland systems. The majority of the Marsh is protected as a State Nature Preserve, but the outskirts of the area are private property ... Although the current channel is located on private property, it is now resulting in, and will continue to result in direct impacts to State land. Sheldon Marsh is a large, contiguous, high quality, wetland system that has been designated a Category 3 wetland by the Ohio EPA. The construction of this project will very likely contribute to the degradation of this system ... the Service is very concerned that the presence of the islands and channel will alter the hydrology of the marsh ... The

proposed project lies within the range of the bald eagle and piping plover, Federally listed threatened and endangered species, respectively. Both species use this area for foraging. The project, as proposed, is likely to adversely modify this area, decreasing its potential value to these and other species. Because of the value of this area to fish and wildlife resources, its value to the endangered piping plover and bald eagle, and its relatively undisturbed nature, the Service recommends that the permit, as proposed, be denied."

"Please note that the Service continues to oppose this project, as proposed. We assert that the project will negatively affect the surrounding environment, as well as Sheldon Marsh State Nature Preserve ... We would like to see the area restored to its original condition and request that Barnes Nursery, Inc. develop less environmentally damaging means to obtain water."

(in order as separated above: USFWS Letter, August 21, 2000, Exhibit C; USFWS Letter, October 13, 2000, Exhibit U; USFWS Letter, June 11, 2001, Exhibit E; September 28, 2001, Exhibit W)

USEPA has also provided a number of observations to the Corps, critical of the proposed activity including the following:

"Despite the avowed environmental enhancement purposes of the project, State biologists maintain that the fill placed to date under a Nationwide Permit NWP 27, exceeded permit conditions, and has already harmed the ecosystem of the adjacent Sheldon's Marsh State Nature Preserve (SNP). Some fill was removed April 18, 2001 under an emergency order to prevent further damage to the area.

The current request is an attempt to retain and reconfigure the remaining fill, now that the Corps has judged the NWP 27 application to be defective and has withdrawn Mr. Barnes permit, requiring re-permitting or restoration.

In our opinion the proposal and continued presence of the remaining fill will cause an irreversible loss of the ecological factors for which the area was designated as a SNP. Photos clearly show the effect the berm placement has had on siltation patterns in the East Bay.

To repeat what we said in our October 12, 2000 letter the State will likely deny water quality certification of this project based on its impacts to Category 3 wetlands under their protection. Therefore, we recommend that a permit be denied for this work and that fill be removed in its entirety. This should be followed by any additional restorative measure prescribed by the State."

(USEPA Letter, June 7, 2001, Exhibit T; see also USEPA Letter, October 12, 2000, Exhibit D)

Indeed, Ohio EPA had consistently expressed its concerns from the moment that it learned construction was taking place in this Category 3 wetland without its authorization, and issued a proposed denial of Barnes Nursery's 401 Water Quality Application. (Ohio EPA Proposed Denial,

Exhibit S) The communications from Ohio EPA and ODNR to the Corps are almost too numerous to mention. It may suffice to say, in at least this Initial Brief, that the most recent reaffirmations of the positions of these two State agencies can be found in their respective denials and demands that the project area be restored to preconstruction conditions without further delay. (Ohio EPA Proposed Denial, Exhibit S; State's Objection, Exhibit B)

The concerns of the Federal and State agencies were expressed to the Corps. Strangely, the Corps not only chose to disregard the combined weight of all of the governmental authorities holding expertise in environmental review in its Environmental Impact Statement, but further baffled the Federal and State environmental agencies by announcing its approval of the project without a consistency concurrence from the State or an override of the State's consistency objection by the Secretary. Pursuant to CZMA § 307(C)(3)(a) and 15 CFR 930.64, once the Federal agency has received the State agency's Objection, the Federal agency shall not issue a federal permit unless the State's Objection is overridden by the Secretary. The CZMA's statutory and regulatory provisions make no exception for a "provisional" permit.

The Corps completely dismissed the fact that Ohio law prohibits the granting of any interest in a dedicated state nature preserve. The feeder channel as proposed by Barnes and approved by the Corps is not permissible under Ohio law. In its response to this issue, the Corps announced that "federal regulations direct [it] to make a permit decision based upon impacts to the aquatic environment and the associated wildlife and cultural resources, not on individual property rights." This is certainly an interesting statement considering that the majority of Corps Environmental Assessment of the proposed activity disregards and disagrees with the very Federal and State agencies possessing the scientific expertise to evaluate the impacts of the proposed activity on the resources at issue.

In response to the activity's adverse effects, the Corps Provisional Permit provides for a conservation easement to be placed over the remaining wetlands existing on Appellant's property. (Provisional Permit, Exhibit R, Special Condition 14) However, adverse effects to wetlands have not been deemed to be mitigated by "preserving the remaining wetlands on the property 'in perpetuity through either covenants on the land or through a gift to a land conservation organization'" where "the wetlands are within the protection of the State's Coastal Management Program" and thus "it is unclear how much more protection such mitigation would offer." *Shickrey Anton Appeal, supra* at 14. This is particularly true in this Appeal where the proposed activity would never have been authorized and would never have occurred had Barnes Nursery been required to submit the correct permit application to the Corps from the beginning.

Therefore, as the Federal and State environmental agencies have unanimously found that the proposed activity will cause a multitude of serious adverse impacts to a Category 3, naturally functioning wetland that was clearly in no need of "restoration" or "enhancement" prior to Barnes Nursery's construction activities, and because any supposed national interest furthered the proposed activity is minimal at most, this requirement for Secretarial override can not be met by Barnes Nursery and the Secretary must refuse to override the State's Objection. 15 CFR 930.121(b); see also *Henry Crosby Appeal, supra*; *Shickrey Anton Appeal, supra*; *Michael P. Galgano Appeal, supra*.

3. **There are reasonable alternatives available which would permit Appellant's proposed activity to be conducted in a manner consistent with Ohio's Coastal Management Program.**

Barnes Nursery also fails to meet the third requirement for override of a State's Objection under 15 CFR 930.121(c), as reasonable alternatives are available which would provide water to Barnes Nursery and would also be consistent with Ohio's CMP. In "determining whether a reasonable alternative is available, the Secretary may consider but is not limited to considering,

previous appeal decisions, alternatives described in objection letters and alternatives and other new information described during the appeal." 15 CFR 930.121(c)

The State's Objection did not present alternatives to the proposed activity that would be consistent with Ohio's CMP. However, after the Appeal was filed by Barnes Nursery, a number of alternatives were presented, but then unilaterally discounted by Barnes Nursery in correspondence regarding its Section 401 Water Quality Certification Application to Ohio EPA. (Barnes Nursery Letter to Ohio EPA, July 24, 2001, Exhibit X) These alternatives included County Water, NASA Aqueduct, Directional Boring, Upland Pipeline & Pump, Groundwater Wells and Ponds. (Barnes Nursery Letter to Ohio EPA, July 24, 2001, Exhibit X, pg. 7) Any of these alternatives would be consistent with Ohio's CMP if all necessary governmental authorizations and approvals were obtained prior to construction. Two of these alternatives in particular would appear to be both 'available' and 'reasonable' as those terms have been defined by the Secretary, those being wells and ponds. Further, one of these alternatives has been found to be both "available" and 'reasonable' in prior consistency appeals involving irrigation projects - ponds. See *Yeamans Hall Club Appeal, supra*, at 13; *A. Elwood Chestnut Appeal, supra* at 13. Therefore, the State proposes and incorporates the alternatives presented by Barnes Nursery in Exhibit X, herein, and specifically suggests that the use of ponds and/or wells would provide an available and reasonable alternative to the proposed activity consistent with Ohio's CMP.

"Once an alternative is proposed by the state, an appellant, in order to prevail on element [three], will have the burden of demonstrating that the alternative is unreasonable or unavailable. *Yeamans Hall Club Appeal, supra* at 13 Under this analysis, the Secretary will first determine if the alternative identified by the State is available. *Id.* at 3 "[U]navailability means that the alternative proposed by the [State] will not allow the project to achieve its primary purpose." *Id.* at 13. "A project that is technically infeasible (a project for which technology and/or resources do not

exist) would also be an unavailable project." *Id.* at 13. Further, an examination of availability under element [three] must look to a project's primary purpose." *Id.* at 15. Otherwise, "an examination of site specific secondary purposes and/or benefits ... that a project may obtain would likely make site alternatives for all projects unavailable." *Id.* at 15. Therefore, the Secretary "will limit [his] inquiry regarding availability to whether the essential or primary purpose can be obtained if the alternative is implemented." *Id.* at 15.

All Federal and State agencies, including the Corps, have found that the central purpose of the proposed activity is water supply for Barnes Nursery. Any alleged restoration benefit to the Category 3 wetlands at issue has been entirely discounted by the agencies as described above. For those reasons, the USEPA determined that "[t]he wildlife enhancement features of this project are an apparent afterthought ." (USEPA Letter, October 12, 2000, Exhibit D) This point was also well made by the USFWS when it stated:

"The Service would like to clarify the purpose of this project. We refute the notion that this project is a wetland restoration project, and assert that the main focus of the project is to provide water to Barnes Nursery. The project may have been designed with ecological benefits in mind; however, the actual purpose is to provide a water source.

[W]e believe that other alternatives exist that could provide Barnes Nursery with water and avoid all impacts to Sheldon Marsh. We believe that these alternatives have not been fully examined, and that this project could be designed such that Sheldon Marsh could remain the pristine ecosystem that it has been for decades."

(USFWS Letter, June 11, 2001, Exhibit E)

In this Appeal, the construction of ponds and/or wells on that portion of Barnes Nursery's property that is not wetland would allow Barnes Nursery to fulfill its essential or primary purpose or providing irrigation to its nursery operation. Further, the technology for the construction of ponds and the drilling of wells obviously exists. Aerial photographs from 1968 show that there were four or five ponds on the Barnes Nursery property at that time. (1968 Aerial Photograph, Exhibit Y) Barnes Nursery also mentions an existing pond on the property. (Barnes Nursery

Letter to Ohio EPA, July 24, 2001, Exhibit X, pg. 20) Therefore, either of these alternatives should be found by the Secretary to be available.

"In order to reach a determination as to whether the alternative identified by the [State] is reasonable (economically feasible), [the Secretary] must weigh the increased costs of the alternative against its environmental advantages." *Yeamans Hall Club Appeal, supra* at 16. "First, [the Secretary] must consider and evaluate the increased costs to the Appellant of implementing the alternative proposed by the [State]." *Id.* at 17.

With regard to the alternative of ponds, Barnes Nursery has given no evidence of the cost of constructing ponds on its non-wetland property. As for the alternative of wells, Barnes Nursery states that it had three wells drilled on its property in 1981 to fill a pond with the well water for irrigation purposes. (Barnes Nursery Letter to Ohio EPA, July 24, 2001, Exhibit X, pg. 20) Barnes Nursery further submits that all three wells were "dry holes." (Barnes Nursery Letter to Ohio EPA, July 24, 2001, Exhibit X, pg. 20) Comments received by ODNR's Division of Water regarding ground water availability at the Barnes Nursery property indicate that a well would need to be approximately 300 feet deep as the limestone aquifer at the site is 200 feet thick. (ODNR Email, February 20, 2002, Exhibit Z) Of the three wells drilled by Barnes Nursery in 1981 one was drilled to a depth of 125 feet and the other two were drilled to a depth of 50 feet. (Barnes Nursery Letter to Ohio EPA, July 24, 2001, Exhibit X, pg. 20) Further, the cost of drilling three wells and purchasing well pumps would total \$84,000. (ODNR Email, February 20, 2002, Exhibit Z) This cost is significantly less than the other alternatives dismissed by Barnes Nursery (Barnes Nursery Letter to Ohio EPA, July 24, 2001, Exhibit X, pg. 7)

After the Secretary has determined the increased costs to the Appellant under the alternative(s) proposed by the State, the Secretary must then consider the environmental gain of not conducting the activity proposed "less the environmental advantages of Appellant's proposal."

*Yeamans Hall Club Appeal, supra* at 18 As discussed above, USFWS, USEPA, Ohio EPA and ODNR have collectively determined that the proposed activity will provide no environmental advantages to this wetland site and will result in serious adverse impacts to the wetlands and to the threatened and endangered species for which it provides critical habitat. The USFWS in summarizing this fact stated

"Prior to construction of the channel and berm, the marsh provided extremely valuable habitat to a huge variety of birds, fish and other wildlife. From the Service's standpoint, there is no need to 'restore' this area, as it had very few signs of human disturbance, and little adverse human activity normally occurs here."

(USFWS Letter, June 11, 2001, Exhibit E)

In weighing the affordable costs of these dual alternatives to Barnes Nursery, against the enormous environmental gain of restoring and preventing further damage to this critical resource, it is clear that either of these alternatives should be deemed reasonable by the Secretary, particularly when the proposed activity offers no benefit, but only significant harm to this delicate ecosystem. Therefore, as there are reasonable alternatives to the proposed activity available to Barnes Nursery which would be consistent with Ohio CMP, Barnes Nursery has failed to achieve the final requirement for federal override and the Secretary should refuse to override the State's Objection.

### III. CONCLUSION

For the reasons established above, the State of Ohio, Department of Natural Resources respectfully requests that the Secretary dismiss Appellant's Consistency Appeal for good cause pursuant to 15 CFR 930.129(a)(5) or, in the alternative, uphold and refuse to override the State's Consistency Objection, as Appellant has failed to present sufficient evidence that its proposed activity is consistent with the purposes and objectives of federal Coastal Zone Management Act.

Respectfully submitted,

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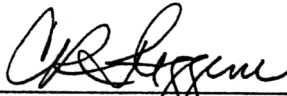
**CERTIFICATE OF SERVICE**

We hereby certify that a true copy of the foregoing **Initial Brief of the State of Ohio, Department of Natural Resources**, was served by Regular U.S. Mail, postage prepaid, this 4<sup>th</sup> day of October, 2002, to:

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